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No. 2721.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Frank M. McKey, trustee in bankruptcy of the Estate of Tomlinson-Humes, Incorporated, Bankrupt,

Appellant,

vs.

Eli P. Clark and Los Angeles Warehouse Company, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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This is an action in equity, brought by a trustee in bankruptcy to recover possession of certain valuable and historic paintings by Hogarth, the first great English painter, upon the theory that they are part of the assets of a bankrupt estate.

An action in replevin on the law side of the court was not brought, because the alternative remedy in damages allowed in such cases would not have been an adequate remedy on account of the peculiar and uncertain value of the property. This point was argued

at length on a motion to dismiss and Judge Wellborn retained the bill.

Thomas Myers of Buffalo owned these pictures in 1911 and at some time during that year made an agreement with Tomlinson-Humes, the present bankrupt, who were dealers in paintings, authorizing them to purchase these pictures at a fixed price, and empowering them to sell the pictures and convey a good title. The following year the pictures were shipped to the bankrupt from New York and placed in the sales-rooms of the bankrupt. The bankrupt then sent Mr. Humes to Los Angeles, the pictures still remaining in the sales-rooms in Chicago, and sold the pictures to the defendant E. P. Clark under a contract which authorized the bankrupt to retain and resell the pictures in their possession and execute any necessary conveyances.

Clark, up to this time, had not seen the paintings, and the bankrupt soon after shipped them to Buffalo, where they were identified by Myers in the presence of agents of the bankrupt and Clark, and a bill of sale was then made from Myers to the bankrupt and one from the bankrupt to the defendant Clark. Within thirty minutes thereafter, the bankrupt endorsed upon the base of defendant's bill of sale an acknowledgment of receipt of the pictures and the pictures were then brought back to the ware-rooms of the bankrupt in Chicago. A short time thereafter, the pictures were sent to New York City and offered for sale by the bankrupt to Senator W. A. Clark, who did not care to purchase them, but allowed them to be left in a store-room in his house.

In July, 1913, a petition in bankruptcy was filed and the present appellant became trustee. Before the trustee could secure possession of the pictures, they were delivered by an employee of Senator Clark to the defendant E. P. Clark and are now subject to his order (and an injunction herein), in the possession of defendant Los Angeles Warehouse Company.

Upon trial, Judge Trippet rendered the decision, which we append to this brief, and dismissed the bill.

For the court's convenience, we suggest the following summary of dates:

June/1911. Option to buy pictures executed by Thos. Myers to Tomlinson-Humes, with power to sell and convey.

March/15/12. Pictures shipped from Ehrich galleries, New York City, to galleries of bankrupt in Chicago.

March/28/12. Tomlinson-Humes execute bill of sale to Clark, the respondent herein, in Los Angeles, and receive his notes for $125,000.

April/10/12. Bankrupt in letter to Clark suggests that Clark go to Buffalo to inspect the pictures, which he had not yet seen.

May/3/12. Bankrupt notifies respondent Clark that his notes have been hypothecated.

May/12. Bankrupt takes the pictures to Buffalo for identification by Myers.

May/11/12. Myers identifies pictures before Clark's agent and executes second bill of sale of pictures to respondent Clark and continues in possession of pictures, endorsing receipt upon the bill of sale.

May/12/12. Bankrupt returns pictures to its storerooms in Chicago.

Sept./12. Pictures taken by bankrupt to Akron, Ohio, for sale.

Feb. or Mch./13. Pictures taken to New York City by bankrupt for sale, and with permission of Senator Clark left in his residence by bankrupt.

July/17/13. Petition in bankruptcy filed against Tomlinson-Humes.

July/30/13. Adjudication; appellant appointed trustee.

Sept./11/13. Pictures shipped by custodian of the Clark residence in New York City to respondent Eli P. Clark in Los Angeles.

Nov./26/13. Trustee filed bill in District Court in Los Angeles to recover possession and restraining order and injunction issued restraining respondent Los Angeles Warehouse Co. from delivering pictures to respondent Clark.

We believe that the above will furnish a useful skeleton upon which to drape the detailed facts of the case.

POINTS.

1. The option from Myers to bankrupt contained a power of sale.

2. The contract between bankrupt and respondent Clark, executed in Los Angeles, is not an option to purchase, but a bill of sale, purporting to transfer title *per verba de praesenti.*

3. The sale by bankrupt to respondent Clark was conclusively fraudulent and void as to creditors in California, where the contract was made, and in Illinois, where the pictures were then situated.

4. The pictures were never delivered by the bankrupt to Clark, nor by Myers to Clark.

5. When the petition in bankruptcy was filed, the pictures were in the possession of the bankrupt and in *custodia legis,* and respondent and all the world were bound by a constructive *caveat,* injunction and attachment.

6. The trustee is entitled to judgment for possession and the bankruptcy court in Illinois is the proper forum to determine the extent of the trustee's interest.

ARGUMENT.

1. THE OPTION FROM MYERS TO BANKRUPT CONTAINED A POWER OF SALE.

The evidence shows that the written contract between Myers and the bankrupt was not in the possession of the trustee and could not be produced upon the trial, but witnesses testified without objection that it contained a power of sale with authority to the bankrupt to deliver to purchaser and make necessary conveyances. "I don't know where the Myers option is. The pictures were shipped to Chicago after the option was concluded. Tomlinson-Humes were authorized to sell them under the terms of the option." [Thurber, Tr. p. 72.] "That option from Mr. Myers authorized the bankrupt to make a conveyance of these pictures if sold." [Thurber, Tr. p. 75.] "After an option was obtained, the pictures were taken to Chicago and put in the hands of our restorer under my directions. We then went to the coast, to Los Angeles, and sold them to Mr. E. P. Clark." [Thurber, Tr. p. 72.] The court

will observe that the above testimony is undisputed and was introduced without objection, and that it is not testimony of a party, but of a disinterested third person. It is undenied.

As bankrupts had the power to sell and convey at the time they made their contract with the respondent Clark, both Myers and bankrupt were bound by this sale, as between themselves and Clark, and a consideration having passed from Clark to bankrupt at that time, it is to be regarded as a concluded sale, good as between bankrupt and Clark, but voidable as to creditors, for failure to comply with the statute of frauds.

2. THE CONTRACT BETWEEN BANKRUPT AND RESPONDENT CLARK, EXECUTED IN LOS ANGELES, IS NOT AN OPTION TO PURCHASE, BUT A BILL OF SALE PURPORTING TO TRANSFER TITLE PER VERBA DE PRAESENTI.

This is a consideration of vital importance to this case and its determination must rest upon the words of the contract of the bankrupt with Clark, executed in Los Angeles March 28, 1912. This contract [Tr. p. 53] recites that bankrupt had an option from Myers; describes the paintings sought in this action, and "second party hereby purchases from first party above named fourteen paintings and each and every one of them for a total price of $125,000 and contemporaneously herewith makes payment for such paintings with four promissory notes." [Tr. p. 56.] It is significant that Clark, who doubtless had the original Myers option before him, "hereby purchases from first party," that is, the bankrupt. This act shows without

question that the bankrupt had by virtue of his option an express authority to sell and convey. Clark was evidently convinced of this fact, for he "hereby purchases from first party" and at the same time gave his negotiable notes for $125,000. The contract was in every respect a sufficient bill of sale and was intended to pass title upon its execution. That this was the view of the parties at the time is shown by the immediate appointment of bankrupt as agent and broker, "from March 28, 1912," to sell the pictures for Clark, "and to assign, transfer and deliver the same on making sale or sales and to receive and receipt for the purchase price thereof." [Tr. p. 61.] Clause fourteen (14) provided for insurance in the name of Clark in an aggregate of $250,000. Not only does the contract purport to convey title to Clark as a complete bill of sale, but it also aims to protect that title and to appoint bankrupts as selling agents with the full power of sale, which could not be revoked or terminated except upon the conditions of payment, minutely set out. [Tr. p. 58.] They had therefore an authority coupled with an interest. The question of when title passes is always to be determined by the intention of the parties as shown by their acts, and we submit that every line of the contract with Clark carries the conviction that it was the intention of the parties that title should pass on March 28, 1912. Upon that day bankrupt had the paintings in their possession in Chicago with full authority under their contract with Myers to sell and make a good conveyance, and their contract with Clark expressly provides that they shall continue in possession with the same authority to sell for Clark

as they doubtless previously had to sell for Myers. No delivery of the paintings was contemplated or mentioned in the contract and the recognition of bankrupt by Clark as his agent was a sufficient delivery from bankrupt to Clark for the purposes of this sale. That this fictitious delivery was void and fraudulent as against creditors does not affect the question, for it was good as between the parties, and we submit that in any case where A is in possession of goods and sells to B, who pays the consideration and makes A his agent to sell, in the absence of a stipulation in regard to delivery, no further delivery is essential as between the parties. It is clear that bankrupt at once might have made a sale of these paintings to a third party and have executed a valid conveyance under the authority expressly granted under the contract. This is precisely what bankrupt did in selling to Clark in Los Angeles by virtue of the power of sale given by Myers. As to all property which a bankrupt could have conveyed a good title, the law vests the trustee with good title.

3. The sale by bankrupt to the respondent Clark was conclusively fraudulent and void as to creditors in California, where the contract was made, and in Illinois, where the property was then situated.

> "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property and not accompanied by an immediate delivery, and followed by an actual and continued possession of the thing transferred, to be fraudu-

lent and therefore void against those who are his creditors, while he remains in possession * * * and against any persons on whom his estate devolves in trust for the benefit of others."

C. C. Cal., Sec. 3440.

"A sale not followed by an open or visible or notorious change of possession or ownership is void under the law of Illinois, which does not allow the owner of personal property to sell and still continue in possession."

Dooley v. Pease, 180 U. S. 126.

Since the amendment of 1910, section 47a and section 70 have been construed together so as to enable a trustee to defeat any pretended transfer which a creditor might have defeated.

In re Hammond, 26 A. B. R. 336, 188 Fed. 1022.

Thus, where the bankrupt made a bill of sale of a motor truck and failed to make delivery before bankruptcy and the vendee filed a petition to reclaim the property, which was still in the possession of the bankrupt, the court held the trustee vested with the rights of a lien creditor by virtue of the amendment to the Bankruptcy Act of 1910, Sec. 47a, 2, and was entitled to reclaim the property as against the bankrupt's vendee. *In re* Waite Robbins Motor Company, 27 A. B. R. 541, 192 Fed. 47.

The court will note that the trial court in his opinion herein relied upon York Mfg. Co. v. Cassell, 201 U. S. 344, which was decided before the amendment of 1910.

As to this case, the Circuit Court of Appeals of the sixth circuit said in a recent decision:

> "There is a general agreement that the amendment of 1910 was made with the very purpose of changing the rule declared in York v. Cassell, and we think it clear that such was the effect and that the trustee stands in the place of each creditor and may assert the right which any creditor would have had against the property 'in custody' if that creditor at date of filing the petition in bankruptcy had been holding an execution levy. See Massachusetts Co. v. Kemper, 34 A. B. R. 80, 220 Fed. 847. It cannot be said that the intent of the amendment was only to put the trustee in the position of a creditor, who had in fact obtained a lien, because that was the law before the amendment." Potter Mfg. Co. v. Arthur, 34 A. B. R. 75 (March, 1915), 220 Fed. 843.

4. The pictures were never delivered by the bankrupt to Clark, nor by Myers to Clark.

We have shown that the bill of sale executed in Los Angeles purported to pass title from Tomlinson-Humes to Clark, while the pictures remained in Chicago, and that it provided the vendor should continue in possession as the agent of Clark for the purpose of sale, an arrangement which was perfectly valid between the parties to pass title to Clark, but which was absolutely void as against the creditors of the vendor. Upon the execution of the bill of sale to Clark, in Los Angeles, Clark delivered to bankrupt his negotiable notes for $125,000 in payment for the paintings and Humes, upon his return to Chicago, notified Clark by letter [Tr. p. 66]: "We have obtained sufficient money on

your paper to pay Mr. Myers." Upon the day that Humes arrived in Chicago on his return from Los Angeles, he wrote Clark [Tr. p. 65]: "We are making great plans for a successful campaign for selling these pictures for you. As soon as we can get these detailed matters adjusted, I will take Mr. Thurber with me to Huntsville to meet Mrs. Scott." Mrs. Scott was a prospective purchaser in Huntsville, Alabama. This letter was written April 10 and in the early part of the following month Tomlinson and Humes, with their attorney, McArdle, went to Buffalo with the pictures for the purpose of having them shown to an agent of the respondent Clark and identified by Mr. Myers. Tomlinson and Humes and Myers met at the office of Mr. Spaulding. "We made the exchanges with Mr. Myers and his daughter of the consideration that was to be paid there for those pictures in Mr. Spaulding's office." [Humes, Tr. p. 70.] The entire party then proceeded to the Lafayette Hotel, where Humes, Tomlinson and McArdle had a suite of three adjoining rooms. The pictures had been brought to Buffalo and were upon chairs in Mr. Tomlinson's room. A second bill of sale from bankrupt to Clark was then delivered to Bennett.

"When we came to the Lafayette Hotel, we went first into one of the rooms at the end of the suite. The pictures were in the center room. We went in there first and Mr. Bennett was waiting in the other room and we had some formalities in there that Mr. Bennett was not in on, and I am inclined to think that the papers were transferred there. * * * Then when we were fixed up between us, we passed into the other room and Mr. Bennett was introduced to Mr. Myers

and Miss Myers and Mr. Spaulding. I believe these papers were all passed to Mr. Bennett. Mr. Myers went over each one of these pictures and identified them to Mr. Bennett. The pictures were transferred right there to Mr. Bennett." [Tomlinson, Tr. p. 71.]

We moved to strike out the last statement of the witness as a conclusion, which motion was denied by the court. We submit that it is clearly a question of law whether on the facts shown, the identification of the pictures in the manner described, operated as a transfer.

The witness then went on to state that he surrendered his room in which the pictures were located and that Mr. Bennett "set about arranging for storage of the paintings that night." Whatever this conclusion of the witness may be worth, it does appear that McArdle and Humes left the room and upon returning a few minutes later McArdle wrote upon the base of bankrupt's second bill of sale to Clark a receipt for all of the paintings, "possession being delivered in the Lafayette Hotel, Buffalo, N. Y., after the paintings had been identified by Mr. Thomas Myers, mentioned in said contract of March 28, 1912." [Tr. p. 52.] The pictures were still in the room of Mr. Tomlinson and the receipt was given within thirty minutes of the time when the pictures were shown to Bennett and the second bill of sale given to Clark.

We have shown that there was no delivery to Clark at the time the first bill of sale was made in Los Angeles and the evidence clearly shows that from that time to the time of the filing of the petition in bankruptcy, the paintings continued to be in the possession

of the bankrupt, who were actively offering them for sale.

Question: "Now, referring to the time when you say these pictures were received from Ehrich, N. Y., in March, 1912, did these pictures remain continuously in the possession of the bankrupt up to the time they were moved from the residence of Senator Clark."

Answer: "Yes, sir." [Thurber, Tr. p. 73.]

"The receipt upon the second page of defendants' Exhibit 3 was written about half an hour after the delivery of the instrument itself. During that time the parties were still in the same locality. The parties did not separate after the delivery of the first contract, but continued together until the receipt was made." [Humes, Tr. p. 94.]

Is it not then apparent that any delivery from bankrupt or Myers to Clark was merely colorable and symbolic, and that during the thirty minutes in which Bennett might have claimed possession on behalf of Clark, such possession was fictitious, was not exclusive, open or notorious and fails absolutely to stand any of the tests of delivery or possession as against creditors represented by the present trustee in bankruptcy?

Where there is no evidence of delivery of the property sold, or that, in point of time, the possession was yielded for an instant by the vendor, there is an entire failure of proof of such a sale as would enable the vendee to hold the property as against attaching creditors of the vendor.

Huschle v. Morris, 131 Ill. 587, 23 N. E. 623.

5. WHEN THE PETITION IN BANKRUPTCY WAS FILED THE PICTURES WERE IN POSSESSION OF THE BANKRUPT, AND IN CUSTODIA LEGIS, AND RESPONDENT AND ALL THE WORLD WERE BOUND BY A CAVEAT, INJUNCTION AND ATTACHMENT.

After the execution of the second bill of sale to Clark bankrupts took the pictures back to Chicago. [English, Tr. p. 76; Thurber, Tr. p. 72.] The expert restorer for bankrupts testifies:

"They were returned from Buffalo, and in a few days I started the restoration and framing of them. It took a long time. Then I packed them again and shipped them to Akron, Ohio. They were down there two or three months. I went down there and packed them and expressed them back to Chicago. They then remained in our possession quite a while. The next shipment was to New York. I expressed them there to S. J. Thurber." [Tr. p. 77.]

Thurber was an employee of bankrupt, who was present at the sale in Los Angeles in March, 1912. A year later we find him still engaged in selling them. He says:

"The next shipment was to New York, about the first of March, 1913. I think that they were delivered to Senator Clark's residence, 77th and Fifth avenue, and then unpacked by me personally and taken upstairs by me and placed in one of Senator Clark's art galleries." [Tr. p. 73.]

Senator Clark did not care to buy the pictures and Thurber continues:

"I asked Mr. Rowcroft, who was superintendent of Mr. Clark's residence, if I could leave them there for

further shipping directions, and he said that would be all right as far as he was concerned. * * * I wrote Mr. Rowcroft to deliver these pictures on my written order only." [Thurber, Tr. p. 73.]

It appears then that some time in April, 1913, these pictures were placed in the basement of Senator Clark's residence, subject to the order of bankrupt, and that they remained there until the 11th day of the following September. In the meantime, an adjudication in bankruptcy was entered against Tomlinson-Humes. The entire theory and claim of respondents in this case is based upon the possession which they acquired from the caretaker of the Clark mansion after adjudication, and we submit that there is no possible state of facts under which this possession acquired after adjudication and without the consent of the judge or referee of the District Court in Illinois could deprive the bankruptcy court in Illinois of the exclusive jurisdiction to determine the question of title and right of possession of these paintings. The amendment of 1910 to section 47a of the Bankruptcy Act thus extends the title of the trustee:

> "As to all the property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor, holding an execution duly returned and unsatisfied."

We have sought to establish our contention that the pretended sale to respondent Clark was void as against creditors for lack of delivery and the bankrupt therefore had title at the time of adjudication. But even if there were any doubt upon this question, it is apparent from a reading of the contract between bankrupt and Clark, set out in the first bill of sale, executed in Los Angeles, that the contract gave bankrupt full authority to sell and convey and this same authority was contained in the original agreement with Myers, executed in 1911, so that at all times since 1911 bankrupt had the power to sell and make conveyance. The Bankruptcy Act, Sec. 70, vests title in the trustee to all "property which, prior to the filing of the petition he (bankrupt) could by any means have transferred." The trustee was therefore vested with title to the paintings and this court has held that the vesting of title in a trustee vests also constructive possession. *(In re* Jersey Island Packing Co., 138 Fed. 625.) We think, however, that the pictures were in the actual possession of the bankrupt in the basement of Senator Clark's residence, subject to bankrupt's order, and that the possession of the bankrupt was possession of the trustee. We have then the trustee in possession, claiming title after adjudication. It is a familiar doctrine often stated by Your Honors that the filing of a petition in bankruptcy operates as a *caveat* to all the world and is in effect an attachment and injunction. Bank v. Sherman, 101 U. S. 407; Muller v. Nugent, 184 U. S. 1. There can therefore be no innocent purchaser or possessor after adjudication.

It is apparent then that any persons having claims to property in the possession of the bankrupt at the time of filing the petition must assert those claims in the bankruptcy proceeding and cannot in any way seize or acquire the property and require the trustee to follow up and adjudicate the matter in other courts.

6. THE TRUSTEE IS ENTITLED TO JUDGMENT FOR POSSESSION AND THE BANKRUPTCY COURT IN ILLINOIS IS THE PROPER FORUM TO DETERMINE THE EXTENT OF THE TRUSTEE'S INTEREST.

We have shown that the bankrupt was in possession at the time of adjudication and for a long time thereafter, and that title was vested in the trustee together with actual or at least constructive possession. It is not pretended that the District Court of Illinois or the referee authorized any delivery to respondent and it is elementary that no other authority could authorize it; even a voluntary delivery by the bankrupt or the trustee would confer no rights. As was said *In re* Rose Mfg. Co., reported 21 A. B. R. 725, 168 Fed. 39:

> "Although the bank took the property from the possession of the receiver without her knowledge or consent, yet if it be assumed that the receiver voluntarily turned it over, still the bankruptcy court was not deprived of jurisdiction."

It was there held that the property must be returned to the possession of the receiver and that the court would not determine questions of title or equities, but would leave the same to the bankruptcy court, to be determined after the order for possession had been complied with.

Even before the amendment of 1910, Your Honors held *In re* Jersey Island Packing Co., 14 A. B. R. 689, 135 Fed. 625:

> "In the present case there was no jurisdiction over the property of the bankrupt in any other court. The only jurisdiction was in the court of bankruptcy. The interest of the bankrupt in the mortgaged property will pass to the trustee when he is appointed, and in the meantime it is under the protection of the bankruptcy court. By sale of property under the direction of the bankruptcy court, interests of all parties may be protected."

Since the amendment to Sec. 47a, it is evident that the trustee is in the position of a lien creditor with an attachment in force, and the respondent in this case has therefore removed property upon which the trustee had a vested lien under the statute. The only forum which can determine the extent and validity of this lien is the bankruptcy court in Illinois. Certainly respondent will not be permitted to forceably remove the property and compel the trustee to determine the question in another court as against one who has removed the property without right. If respondent has any rights, they can be fully protected in a bankruptcy court.

We pass now to the discussion of the decision of the trial court. This decision the court delivered from the bench, but for some reason which we do not understand, afterwards refused to sign it. We were therefore unable to make it a part of the clerk's record and have inserted it at the end of this brief.

The court first dwells at length on York Mfg. Co. v. Cassell, 201 U. S. 344, which has been so entirely discredited that we know of no other present support for it. The rule in that case placed the trustee in the shoes of the bankrupt and subject to all equities good as against him.

> "Under the rule of York v. Cassell, *supra,* this superior right did not pass to the trustee in bankruptcy, but he stood in the shoes of the bankrupt. This rule has been changed by the amendment of June 25, 1910, to Sec. 47a, 2. * * * There is a general agreement that the amendment of 1910 was made with the very purpose of changing the rule declared in York v. Cassell; Remington, volume 3, paragraphs 1137 and 1213½; Loveland, 4th edition, Vol. 1, 1767; and we think it clear that such was the effect and that the trustee stands in the place of each creditor and may assert the right which any creditor would have had against the property 'in custody' if that creditor at date of filing the petition in bankruptcy had been holding an execution levy. See Massachusetts Co. v. Kemper, C. C. A. 6th circuit, 34 A. B. R. 80, 220 Fed. 847. It cannot be said that the intent of the amendemnt was only to put the trustee in the position of the creditor who in fact had obtained a lien because that was the law before the amendment."
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> Potter Mfg. Co. v. Arthur, C. C. A. 6th circuit, 1915, 34 A. B. R. 75, 220 Fed. 843.

The court then quotes at length Hiscock v. Varick Bank, 206 U. S. 40, which was also decided before the amendment at the October term, 1906, and then refers to Security Warehousing Co. v. Hand, reported in the

same volume, page 415, which was decided at the same term, and is therefore without bearing in construing the amendment passed four years later.

The trial court continues:

"The only claim that the bankrupt had to this property was a contract of agency. * * * Now, I am of the opinion that the bankruptcy intervening, insolvency intervening did away with the agency."

We have already shown that the contract between bankrupt and Clark was not a mere agency, but an agency coupled with an interest. During the first year of the contract Clark had no power to terminate the agency and after that year he could only withdraw the paintings from sale by payment of 10% of the minimum selling price of $480,000. [Tr. p. 58.] How is it possible to conclude that such an agency, coupled with a vested interest, was terminated by the bankruptcy? The act itself vests in the trustee title to property which the bankrupt "could by any means have transferred" (Sec. 70a, 5) and the bankrupt was "clothed with full power and authority to sell—and to assign, transfer and deliver." [Tr. p. 61.]

But even if, as the court says, this was the only claim which the bankrupt could assert to the property, this is a false premise upon which to base the rights of the trustee. Here again the trial court was misled by York Mfg. Co. v. Cassell, cited at length in his opinion. Under the present Bankruptcy Act, the trustee is not limited to the title or claims of the bankrupt, as was said in Potter Mfg. Co. v. Arthur *(supra)*. The trustee no longer stands in the shoes of the bankrupt. We have shown, moreover, that even as between bank-

rupt and Clark, the agency was not a mere employment, but was coupled with an express interest in the property and full power to sell and convey. The theory of the trial court that such an agency could be terminated by bankruptcy would leave the trustee in a worse position than the bankrupt, whereas the express purpose and result of the amendments to the Bankruptcy Act, to which we have called the court's attention, was to place the trustee in a better position than the bankrupt, to-wit, in the condition and position of a lien creditor in possession.

The trial court continues: "It annulled the contract of agency and when that occurred, the owner of the property had a right to take possession of it." This proceeds upon the false premise that Clark owned the pictures, but this very question of ownership the trial court had no jurisdiction to determine. The issue of title is not tendered in this case, which concerns only the right of possession. The only court which has jurisdiction to determine the question of title is the bankruptcy court in Illinois, on proper issues there tendered. The bill of complaint herein is a chancery action in replevin and there was no attempt by the respondent to set up the question of title by cross-bill or prayer for affirmative relief.

The trial court voices a doubt whether the bankrupt was in possession, but this doubt we cannot share, as the evidence is undisputed. The bankrupt's employee, Thurber, had possession of the paintings in New York at the time of adjudication.

The court then asserts that our claim is that we were entitled to possession in order to assert some

imaginary lien. We submit that here again the learned trial court was misled by York Mfg. Co. v. Cassell, and the argument therein, and has overlooked the amendment of 1910, under which the trustee is by law vested with the rights of a lien claimant and it is unnecessary for him to make any proof of an actual lien or an actual lien claimant. He is at least *prima facie* an attaching creditor as to all property in possession of bankrupt.

The opinion continues:

"Assuming I am wrong in regard to the agency being revoked by this bankruptcy, the time in which these agents had to sell expired more than a year ago and the trustee now, if he got possession of it, could not perform the contract, because the contract has expired. It is absolutely a moot question."

The contract provided [Tr. p. 58] that if bankrupt did not sell during the first year, Clark might withdraw the pictures during thirty days following by paying 10% of $480,000.

"9. It is understood that if second party does not avail himself of the above described rights to withdraw any paintings from sale within thirty days after the expiration of one year from this date, then the paintings at that time on hand shall remain in the hands of the first party exclusively for a period of one year from that date under the provisions of this agreement.

"11. At the expiration of this contract on July 28, 1914, second party shall have the right to withdraw from sale and from the hands or agency of first party * * * all paintings unsold."

It is admitted by the answer that the respondent acquired possession of these pictures in September, 1913, nearly a year before he had a right under the contract to withdraw them, but the trial court thinks that because the year expired before trial there is now no right left in the trustee. If this were true, the respondent would be a vast gainer by his own wrong, but it must be evident that the question for determination is what right the trustee had upon the day when he was deprived of possession or at the utmost upon the day when he filed his bill in this proceeding. It is unthinkable that a party may take advantage of his own wrongful taking of property and the lapse of time during which a suit to recover it is pending as the basis of defeating the party from whom it was wrongfully taken.

It was the opinion of the trial court that bankruptcy terminated any agency which bankrupt had to sell for Clark, but we know of no authority for such view nor was any cited. On the contrary, as Remington says, Sec. 653:

> "Bankruptcy affects property and debts. It passes title to the property and divides it among the debts. It is not concerned with contractual relations or obligations. * * * Where a contractual relation exists, which has not become merged in a right of action provable as a debt, claim or demand in bankruptcy, such contractual relation continues to exist unimpaired; if the contractual relation is such as may be assumed by another, the trustee may assume it."

As was well said *In re* Roth, 164 Fed. 64, in speaking of the contention that the relation of landlord and tenant was terminated by bankruptcy:

> "Bankruptcy does not terminate the lease. This must be so from the very nature of bankruptcy, which does not destroy, but conserves property, and the leasehold estate is property which may and frequently does become the property of the trustee and inure to the benefit of creditors. It is impossible to conceive of a trustee in bankruptcy selling a lease, if bankruptcy destroy the same lease. If the lease survives adjudication and is rejected by the trustee (not appropriated as belonging to the estate), it is necessarily an existing and continuing contract and such contract requires parties thereto—the landlord is one—the other must be the bankrupt lessee."

So even in the case of personal privileges, such as membership in exchanges and clubs and licenses for the conduct of business, it is held that bankruptcy does not affect the relation. Thus the Circuit Court of Appeals for the first circuit in Fisher v. Cushman, 103 Fed. 860, held that even a liquor license granted by a police board was not affected by bankruptcy and any beneficial interest passed to the trustee. We contend that even if this were a mere agency, not coupled with an interest, it would not be terminated by the bankruptcy. The sale of these pictures could be carried on by the trustee as well as the bankrupt could have done it, and the universal rule is that if the contract is capable of being carried out by another, it is not affected by the bankruptcy.

We might admit that agencies for the performance of services, requiring personal skill, would be affected by bankruptcy as they are by death, and even if that were true, which we very much doubt, it does not affect this case, because the only part of the contract requiring personal skill, to-wit, the retouching of the paintings, had been performed and there remained merely the procuring of a purchaser. Thus in Janin v. Browne, 57 Cal. 37, the court said:

> "What remained to be executed, the sale of the property, could be done as well by the administrator as by Browne, had he lived."

And the same court said in Husheon v. Kelly, 162 Cal. 656:

> "The rule does not apply where the services are of such a character that they may be as well performed by others."

Although we have discussed this question, we attach no importance to it for the reason that the question of the continuance of the agency or the life of the contract itself is not concerned in this case, because the trustees will sell by virtue of vested rights of creditors in the property, expressly given by the Bankruptcy Act, whereas the trial court apparently thought that the trustee's right of possession, and right to sell, must be rested upon the relation of principal and agent. We are not here concerned with the question of any relation between bankrupt and Clark, but purely with the right of possession as between the trustee and Clark. Under the authority of York Mfg. Co. v. Cassell, these relations would be equivalent, but since the amendment

of 1910, the trustee stands in an entirely different position from that occupied by the bankrupt. We may suggest further that even if there were the relation of agency as between bankrupt and Clark, there never was any valid agency as between Clark and creditors of the bankrupt, because as to the claims of creditors, the bankrupt was the owner of the property and not merely an agent with possession for purposes of sale.

In conclusion, we invite the court's attention to the opinion of the trial court, which follows this brief, and suggest that it plainly appears therefrom that the trial court relied upon the authority of York Mfg. Co. v. Cassell, which is no longer a leading case, and that it further appears from the transcript that the appellant herein is entitled to possession of the paintings and that the question of title or equities cannot be determined in this proceeding, but that any rights which respondent may have can be fully protected upon application in a proper manner to the bankruptcy court in Illinois, and we are therefore entitled to a decree for possession.

Respectfully submitted,
MULFORD & DRYER,
WILBUR BASSETT,
Solicitors for Appellant.

DECISION OF THE COURT.

In the District Court of the United States for the Southern District of California, Southern Division.

Hon. Oscar A. Trippet, presiding.

Frank M. McKey, as trustee, plaintiff, v. Eli P. Clark, defendant.

Decision of the court.

Monday, August 2, 1915, 10 o'clock a, m,

The Court: In this case of McKey, trustee, v Clark, one of the issues in the case is in regard to the conveyance, or the agreement, being void by reason of the statute of frauds. I sufficiently disposed of that part of the issues during the trial. My idea is that the bankrupt never at any time had any interest in that property.

Now, during the trial the case of Jersey Packing Company was cited and relied upon as authority for the fact that a bankruptcy proceeding acts as an attachment of the property and the property has to pass into the hands of the trustee regardless of the rights of other people.

The case of the York Manufacturing Company v. Cassell, decided in 1905, previous to the amendment of the Bankruptcy Act. I can state the facts: The case is where the York Manufacturing Company have made a conditional sale of property to the bankrupt and then bankruptcy intervened. This agreement was not filed and it was claimed the property should pass into the hands of the trustee and the York Manufacturing Company could not take it. The decision of Justice Peckham is as follows:

"We come, then, to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the

seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate.

"We are of opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof. Under the provisions of the Bankrupt Act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right as between the bankrupt and the York Manufacturing Company was in the latter company to take the machinery on account of default in the payment therefor. The trustee, under such circumstances, stands simply in the shoes of the bankrupt, and, as between them, he has no greater right than the bankrupt. This is held in Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690. The same view was taken in Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306. It was there stated that 'under the present Bankrupt Act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt.' "

Cites authorities. This case goes ahead:

"The remark made in Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, 'that the filing of the petition (in bankruptcy) is a *caveat* to all the world, and in effect an attachment and injunction,' was made in regard to the particular facts in that case. The case itself raised questions entirely foreign to the one herein arising, and did not involve any inquiry into the title of a trustee in bankruptcy as between himself and the bankrupt, under such facts as are above stated. The dispute in the Mueller case was whether the court

in bankruptcy had power to compel, in a summary way, the surrender of money or other property of the bankrupt, in the possession of the bankrupt, or of someone for him, without resorting to a suit for that purpose. This court held, as stated by the chief justice in delivering its opinion: 'The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication and expense intended to be avoided by the simpler methods of the Bankrupt Law.' It was held that the trustee was not thus bound, but had the right, under the facts in that case, to proceed under the Bankrupt Law itself and take the property out of the hands of the bankrupt or anyone holding it for him.

"In this case, under the authorities already cited, the York Manufacturing Company had the right, as between itself and the trustee in bankruptcy, to take the property under the unfiled contract with the bankrupt, and the adjudication in bankruptcy did not operate as a lien upon this machinery in favor of the trustee as against the York Manufacturing Company."

In Hiscock v. Varick Bank, 206 U. S., page 40, say nothing upon the right of the trustee to take the property whether or no; it says:

"Section 57h provides: 'The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims and a dividend shall be paid only on the unpaid balance.'

"The court was by this subdivision empowered to direct a disposition of the pledge, or the ascertainment of its value, where the parties had failed to do so by their own agreement. It is only when the securities have not been disposed of by the creditor in accordance with his contract that the court may direct what shall be done in the premises. Of course, where there is fraud or a proceeding contrary to the contract, the interposition of the court might properly be invoked.

"According to the terms of the bankrupt act the title of the bankrupt is vested in the trustee by operation of law as of the date of the adjudication. Act of 1898, 70 a, e. By the act of 1867 (14 Stat. at L. 522, chap. 176) it was provided that as soon as an assignee was appointed and qualified the judge or register should, by instrument, assign or convey to him all the property of the bankrupt, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and, by operation of law, shall vest the title to such estate, both real and personal, in the assignee. But 70a of the act of 1898 omits the provision that the trustee's title 'shall relate back to the commencement of the proceedings in bankruptcy,' and explicitly states that it shall vest 'as of the date he was adjudged a bankrupt.' When the petition in the present case was filed the bank had a valid lien upon these policies for the payment of its debt. The contracts under which they were pledged were valid and enforceable under the laws of New York, where the debt was incurred and the lien created. The bankruptcy act did not attempt, by any of its provisions, to deprive a lienor of any remedy which the law of the state vested him with."

At page 24 is another case in point, in the same volume, 206, in reviewing this York Manufacturing case, it says that it is held that a conditional sale was

valid under the laws of Ohio except as to a certain class of creditors and if there were no such creditors there was no one who could question the validity of the instrument; that the adjudication in bankruptcy did not give the trustee the right to do so because in that case the adjudication did not operate as the equivalent of a judgment or attachment or other specific lien upon the property.

Now, the plaintiff in this case asserts they have got a right to take possession of this property and turn it over to the trustee and then if the owner of the property wants it, he has got to go to an officer of the court, to-wit, the referee in bankruptcy, and litigate his rights. The only claim that the bankrupt had to this property was a contract of agency. This contract of agency gave the right of possession of the property to the bankrupt and the plaintiff claims that right of possession should pass to his trustee and the trustee would have a right to carry out this contract of agency. Now, I am of the opinion that the bankruptcy intervening, insolvency intervening, did away with the agency. It annulled the contract of agency and when that occurred the owner of the property had a right to take possession of it. There is a question in this case as to whether or not possession was in the bankrupt at the time of the bankruptcy. It is not a question that is necessary to decide at this time but the court necessarily doubts very much whether the bankrupt had possession of that property.

Now, plaintiff claims the bankrupt was entitled to the possession in order that he might assert some lien on the property, or the trustee assert some lien on the property—that is, they claim it belonged to the bankrupt who was caring for the property and working upon it. Now, that claim is wholly imaginary. The contract of agency provided these agents shall do all

they do for nothing. They shall have no claim whatever against the owner of that property for anything they do for that property, for keeping it, for trying to sell it, for touching it up—it was some pictures—improving them, putting new frames on them—they were to do all that without compensation and without reward. Now, in this case there is absolutely no evidence any one has got any claim to that property.

Assuming I am wrong in regard to the agency being revoked by this bankruptcy, the time in which these agents had to sell expired more than a year ago and the trustee now, if he got possession of it, could not perform the contract because the contract had expired. It is absolutely a moot question. If the trustee has any claim for damages against the owner of this property for taking it, it is not asserted in this case and the whole case is a moot case in my opinion and the bill will be dismissed.